

Anticipated acquisition by Vision Express (UK) Limited of Tesco Opticians

Decision on acceptance of undertakings in lieu of reference

ME/6696/17

Introduction

1. Vision Express (UK) Limited (**Vision Express**) has agreed to acquire 209 Tesco Opticians optical retail outlets located within Tesco stores in the UK and Ireland (**Tesco Opticians**) from Tesco Stores Limited and Tesco Ireland Limited (the **Merger**). Vision Express and Tesco Opticians are together referred to as the **Parties**.
2. On 28 September 2017, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On 5 October 2017, Vision Express offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act. The CMA gave notice to Vision Express on 11 October 2017, pursuant to section 73A(2)(b) of the Act, that it considered that there were reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it was considering Vision Express' offer (the **UILs Provisional Acceptance Decision**).
4. The text of the SLC Decision and the UILs Provisional Acceptance Decision are available on the CMA webpages.¹

¹ See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the supply of optical products and services in bricks-and-mortar stores in three local areas (Barrow-in-Furness, Helston and Ryde)² as a result of horizontal unilateral effects.
6. As set out in the UIL Provisional Acceptance Decision, Vision Express has offered to divest the business and assets (including staff, ophthalmic equipment, fixtures and fittings, a customer database and the assignment of the applicable lease) of the Vision Express store in each of the three local areas in which the SLC Decision identified competition concerns (the **Divestment Businesses**),³ as set out in more detail in the text of the consultation on the CMA webpages (the **UILs**).⁴

Consultation

7. On 20 October 2017, pursuant to paragraph 2(1) of Schedule 10 to the Act, the CMA published the UILs, inviting interested parties to give their views on the UILs. The relevant text from the consultation is set out at Annex 1 of this decision.⁵ For the reasons set out in the consultation, the CMA's preliminary view was that the UILs would resolve the SLC identified in the SLC decision in a clear-cut manner, ie without giving rise to material doubts about the overall effectiveness of the UILs or concerns about their implementation.⁶
8. The CMA received two submissions from third parties during the consultation period. Neither submission raised concerns about the effectiveness of the UILs in remedying the SLC identified in the SLC Decision. These submissions instead raised concerns around the implementation of the UILs, namely that customers of the Divestment Businesses may have been encouraged (or could be encouraged while the sale of the Divestment Business remains ongoing) to transfer from the existing Vision Express store to the newly acquired Tesco Opticians store in one or more of the three local areas.

² Barrow-in-Furness is located in Cumbria, North West England. Helston is located in Cornwall, England. Ryde is located in Isle of Wight, England.

³ The Divestment Businesses are at the following addresses: 178-180 Dalton Road, Barrow-in-Furness, Cumbria, LA14 1PR; Coinagehall Street, Helston, Cornwall, TR13 8ER; and 40 Union Street, Ryde, Isle of Wight, PO33 2LF.

⁴ See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

⁵ The full consultation text was published on <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

⁶ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

9. The CMA has carefully considered these submissions. The CMA notes that the UILs already address many of the concerns raised in these submissions. In particular, paragraph 9.1 of the UILs prevents the electronic/physical transfer of customer lists between the Divestment Businesses and the Vision Express business and paragraph 9.1(l) expressly forbids any transfer of confidential information between the Divestment Businesses and the remainder of the Vision Express business. Consequently, Tesco Opticians store staff will not be able to gain access to the Divestment Businesses customer lists. Vision Express has also confirmed that it will ring-fence the customer databases for the three relevant stores, so that the Tesco Opticians stores (or any other Vision Express stores) are not able to access the customer databases post completion of the divestment.
10. The Parties have also taken further actions to avoid the potential transfer of customers between the Divestment Businesses and the Vision Express business prior to divestiture, which has included communications with staff at the relevant Tesco Opticians stores requiring them not to actively target or encourage Vision Express customers to visit their stores prior to completion of the divestment.
11. The third parties also emphasised the need for a suitable purchaser (or purchasers) of the Divestment Businesses. They suggested that the Divestment Businesses would be most effectively able to compete if purchased by an operator (or operators) with (i) sufficient scale; and (ii) industry-specific expertise.
12. The CMA agrees regarding the importance of ensuring the suitability of the purchaser (or purchasers) of the Divestment Businesses. The CMA notes, however, that such factors fall to be considered within its assessment of the suitability of any proposed purchaser (or purchasers) rather than in relation to its assessment of the proposed UILs.
13. For the reasons set out above, third party submissions did not cause the CMA to change its preliminary view that the UILs would be acceptable.
14. The CMA therefore considers that the UILs offered by Vision Express are clear-cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision.

Decision

15. For the reasons set out above, the CMA considers that the UILs provided by Vision Express are as comprehensive a solution as is reasonable and

practicable and remedy, mitigate or prevent the SLC identified in the SLC Decision and any adverse effects resulting from it. The CMA has therefore decided to accept the UILs offered by Vision Express pursuant to section 73 of the Act. The Merger will therefore not be referred for a phase 2 investigation.

16. The undertakings, which have been signed by Vision Express and will be published on the CMA webpages,⁷ will come into effect from the date of this decision.

Adam Land
Senior Director, RBFA
Competition and Markets Authority
15 November 2017

⁷ See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

Annex 1

Anticipated acquisition by Vision Express (UK) Limited of Tesco Opticians

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

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Introduction

1. Vision Express (UK) Limited (**Vision Express**) has agreed to acquire 209 Tesco Opticians optical retail outlets located within Tesco stores in the UK and Ireland (**Tesco Opticians**) from Tesco Stores Limited and Tesco Ireland Limited (the **Merger**). Vision Express and Tesco Opticians are together referred to as the **Parties**.
2. On 28 September 2017, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**). The text of the SLC Decision is available on the CMA webpages.⁸
3. On 5 October 2017, Vision Express offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 11 October 2017, the CMA gave notice to the Parties, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is

⁸ See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

considering Vision Express' offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the supply of optical services and products in bricks-and-mortar stores in Barrow-in-Furness (Cumbria), Helston (Cornwall) and Ryde (Isle of Wight).
6. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA Vision Express has offered undertakings to divest the business and assets (including staff, ophthalmic equipment, fixtures and fittings, a customer database and the assignment of the applicable lease) of the Vision Express store in each of the three local areas in which the SLC Decision identified competition concerns (the **Divestment Businesses**).⁹ The text of the undertakings is available on the CMA webpages (the **Proposed Undertakings**).¹⁰
7. If the CMA accepts the Proposed Undertakings, Vision Express will have a set period of time determined by the CMA to enter into an agreement for the sale and purchase of the Divestment Businesses to a buyer or buyers approved by the CMA. If Vision Express does not effect the sale of the Divestment Business in that time period, and it is not extended by the CMA, the CMA will have the power to appoint a trustee to effect the sale of those stores. In either case, until the sale of the Divestment Businesses is completed, Vision Express will be obliged to continue to run the Divestment Businesses as going concerns and minimise as far as possible any risk of loss of competitive potential of the Divestment Businesses.
8. The Proposed Undertakings also require that the Divestment Businesses be sold to a buyer or buyers who have the financial resources, expertise, incentive and intention to maintain and operate the Divestment Businesses as viable and active businesses in competition with Vision Express and other competitors in the supply of optical services and products through bricks-and-mortar stores in the three local areas.
9. As set out at paragraphs 14 to 17 of the UIL Provisional Acceptance Decision, the CMA does not currently consider it appropriate to seek an upfront buyer in

⁹ The Divestment Businesses are at the following addresses: 178-180 Dalton Road, Barrow-in-Furness, Cumbria, LA14 1PR; Coinagehall Street, Helston, Cornwall, TR13 8ER; and 40 Union Street, Ryde, Isle of Wight, PO33 2LF.

¹⁰ See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

respect of the Divestment Businesses. However, this is subject to responses to this consultation.

CMA assessment

10. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.¹¹ This is because the proposed structural divestments are intended to result in a new business owner of the three sites that will continue to provide a similar range of products and services to that currently offered by the Divestment Businesses. As such, the Proposed Undertakings will replace the competitive constraint provided by Vision Express in each of these local areas that would otherwise be lost following the Merger.
11. The CMA also currently believes that the Proposed Undertakings would be capable of ready implementation, because each of the divestment stores are viable and stand-alone businesses (ie they operate relatively independently) that are readily capable of being sold and likely to continue to operate as a going concern. Further, Vision Express has provided evidence of a number of prospective purchasers that have shown an interest in acquiring the Divestment Businesses and the CMA has no reason to doubt the commercial attractiveness of the Divestment Businesses.

Proposed decision and next steps

12. For the reasons set out above, the CMA currently believes that the Proposed Undertakings are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
13. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the proposed undertaking is available on the CMA web pages.¹²

¹¹ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

¹² See <https://www.gov.uk/cma-cases/vision-express-tesco-opticians-merger-inquiry>.

14. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.¹³
15. Representations should be made in writing to the CMA and be addressed to:

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Mergers Group
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: Cristina.Caballero@cma.gsi.gov.uk
Telephone: 020 3738 6639

Deadline for comments: 3 November 2017

¹³ Under paragraph 2(4) of Schedule 10 to the Act.